(4)

No. 06-1578

IN THE

Supreme Court of the United States

ANDALUSIA DISTRIBUTING COMPANY, INC., *ET AL.*,
Petitioners,

v.

R.J. REYNOLDS TOBACCO COMPANY,
Respondent.

ANDALUSIA DISTRIBUTING COMPANY, INC., *ET AL.*,
Petitioners,

v.

PHILIP MORRIS USA, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

KYLE M. KEEGAN
CHRIS D. KIESEL
ROY, KIESEL, KEEGAN & DENICOLA
2355 DRUSILLA LANE
BATON ROUGE, LA 70809
(225) 927-9908

PAUL M. SMITH*
JENNER & BLOCK LLP
601 THIRTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 639-6000

August 14, 2007

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Decisions Below Did Not Rest on a Determination that Petitioners' Claims Lacked Evidentiary Support. 2

II. Respondents Fail to Mount a Convincing Defense of the Sixth Circuit's Actual Rulings. 5

III. The Sixth Circuit's Rulings Are Sufficiently Important to Warrant Review. 7

IV. PM's Defense of the Sixth Circuit's Sherman Act Ruling is Equally Unavailing. 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) 8

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 8

Calumet Breweries, Inc. v. G. Heileman Brewing Co., 951 F. Supp. 749 (N.D. Ind. 1994) 6

Conwood Co. v. U.S. Tobacco Co., 290 F.3d 786 (6th Cir. 2002) 10

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 1, 5, 6

LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) 10

National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978) 8

National Dairy Products Corp. v. FTC, 395 F.2d 517 (7th Cir. 1968) 6

ARGUMENT

Unable to mount a convincing defense of the Sixth Circuit's rulings on the merits, respondents attempt to rewrite those rulings to make them seem less legally significant. But try as they might, they cannot disguise the Sixth Circuit's clear legal pronouncements as rulings against petitioners on the facts. Far from rejecting petitioners' factual claims, the district court, in addressing respondents' motions for summary judgment, *expressly assumed the truth of petitioners' factual allegations*, which were supported by voluminous sworn testimony. The district court thus did not in any way suggest that petitioners were incorrect in claiming that with the particular mix of retailer customers they were serving when the market-share discount programs were instituted, it was impossible, as a practical matter, for them achieve the market shares of R.J. Reynolds ("RJR") or Philip Morris ("PM") products needed to receive favorable pricing. To the contrary, summary judgment was granted despite the assumption that petitioners could not force their existing customers to buy cigarettes in the ratios demanded and, saddled with higher costs as a result of the market-share programs, could not compete to acquire customers who would buy sufficient levels of RJR or PM products.

Instead of ruling on the facts, the district court concluded as a matter of law that these factual circumstances did not make the discounts functionally unavailable. And the Sixth Circuit's central rulings were precisely the same — that discounts are "functionally available" if offered to all buyers, even if it would be commercial suicide for some buyers to accept the terms required to receive those discounts.

It follows that petitioners in no way exaggerated the extent of the tension between the rulings below and the policies of the Act, as reflected in this Court's seminal decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). If

the market-share discounts were functionally available to all buyers here, simply because they were offered on the same terms to everyone, then the volume discounts at issue in *Morton Salt* were necessarily functionally available to everyone as well. But this Court, recognizing that the concept of functional availability demands examination of a *buyer's* circumstances and how those circumstances affect its ability to accept the terms of the offer, ruled that volume discounts are not functionally available when the volumes demanded exceed what some retailers could hope to resell in their existing retail outlets. The Sixth Circuit has effectively overruled that decision.

I. The Decisions Below Did Not Rest on a Determination that Petitioners' Claims Lacked Evidentiary Support.

Missing from respondents' briefs is any recognition that, in ruling on the respondents' motions for summary judgment, the district court accepted as true all of petitioners' factual allegations. Thus, in *R.J. Reynolds*, the district court stated that "[f]or the purpose of deciding this motion for summary judgment, the Court will adopt the plaintiffs' statement of facts filed on December 17, 2004, and other facts submitted in the plaintiffs' Memorandum." Pet. App. 98a. It then set forth pages of factual recitation reflecting the plaintiffs' positions that petitioners' existing customers will not allow petitioners to achieve the market-share targets in sales to them, that any attempt to force that outcome would lead to loss of those customers, and that "disfavored wholesalers paying the highest prices for RJR products cannot realistically compete for coveted high RJR share retail accounts." Pet. App. 103a. The district court summarized the facts being assumed for purposes of summary judgment by saying: "Plaintiffs have not made any 'choice' to emphasize fourth-tier or other non-RJR brand over RJR's

products. They simply respond to the demand of their customers." *Id.*

Similarly, in *Philip Morris*, the district court stated that "[f]or the purpose of deciding this motion for summary judgment, the Court will adopt the facts as submitted by the plaintiffs." Pet. App. 76a. The district court's ruling against petitioners was therefore not based on an assessment of the sufficiency of petitioners' evidence that they could not satisfy PM's market share demands and stay in business. To the contrary, the court ruled as a matter of law that the discounts were functionally available as long as they were made "available to all customers using a nondiscriminatory formula." Pet. App. 83a. In the court's view, the fact that "plaintiffs may be faced with difficult business choices, *and even that some may go out of business*, makes little difference and does not create a genuine issue of material fact in this case. *Id.* (emphasis added). The court further noted the "undisputed fact" the "plaintiffs' customer demands" were preventing them from achieving the market shares demanded by PM, but concluded that this did not support petitioners' claims because PM did not itself create that problem. Pet. App. 88a.

On appeal, the Sixth Circuit treated the petitioners' factual claims in the same manner. In *R. J. Reynolds*, the Sixth Circuit "[a]ccept[ed] as true plaintiffs' allegations," Pet. App. 42a, which included the claim that participation in the RJR discount program would destroy petitioners' businesses, Pet. App. 38a, as well as an expert opinion that "RJR's best prices were not practically available to most distributors," Pet. App. 40a, because they "cannot measurably increase the demand for RJR products," Pet. App. 41a. But the court of appeals ruled that because RJR's "market-share discount was *offered* to all wholesalers using a nondiscriminatory formula," it "was therefore functionally

available to plaintiffs not only in theory, but in fact." Pet. App. 49a.

RJR attempts to hide this reality by focusing at length on the Sixth Circuit's discussion of the evidence concerning possible *explanations* of the difficulties petitioners faced in achieving the market shares RJR demanded. Petitioners had argued that they served retailers who sold to poorer customers, who in turn tended to buy more fourth-tier (non-RJR) cigarettes. RJR responded with evidence showing that the geographic areas in which petitioners operated were not particularly poor and that RJR's market shares in those areas were not markedly different from its statewide shares. RJR Br. at 5-12 (discussing Pet. App 44a-45a). But that fact, even if true, in no way undercuts the undisputed evidence that the particular retailer customers petitioners served did not want to buy enough RJR products, measured as a percentage of all their purchases, to allow petitioners to obtain favorable discounts.

The *Philip Morris* opinion also rested on petitioners' evidence, which the panel treated as "undisputed." *See* Pet. App. 64a-68a. The Sixth Circuit flatly ruled that "'[a]s long as defendant offered the same best price to plaintiffs as to their competitors, using a nondiscriminatory pricing formula, defendant did not violate the Robinson-Patman Act.'" Pet. App. 67a (quoting *R.J. Reynolds*, Pet. App. 46a). Here again, the court noted that PM's market share in the geographic areas where petitioners sold exceeded the PM share of petitioners' sales. Pet. App. 68a. But eliminating a geographic explanation of petitioners' problems does not make those "undisputed" problems disappear.

In sum, there is no basis whatsoever for respondents' arguments that petitioners have mischaracterized the rulings below. The Sixth Circuit's opinions did not turn on any perceived inadequacy in the extensive evidence petitioners

had brought forward to support their claims. While that court referred to the fact that petitioners had a "choice" about whether to comply with the market share demands of PM and RJR, Pet. App. 49a, 69a, all that it meant was that it was physically possible for petitioners to refuse to meet their customers' demands for competing brands. The court did not suggest that this approach was a viable business strategy, nor could it have done so on this record. After all, if petitioners could match the market share demands from RJR and PM, they would have done so. Rather, the Sixth Circuit's rulings reflect an unfortunate failure to apprehend the legal significance of the facts the district court accepted as established.

II. Respondents Fail to Mount a Convincing Defense of the Sixth Circuit's Actual Rulings.

Respondents wholly fail to provide a persuasive defense of the Sixth Circuit's actual ruling. They never explain, nor can they, how a discount can be viewed as "functionally" available if, to attain it, a buyer would have to take actions that would lead to bankruptcy. The Sixth Circuit's insulation of such programs from Robinson-Patman Act scrutiny plainly nullifies the "functional" component of the "functional availability" test.

Morton Salt forbids such a result. Contrary to RJR's suggestion, RJR Br. 13, the *Morton Salt* discount scheme was not alleged to be discriminatory; it was available, "'on equal terms,'" to all comers. 334 U.S. at 42 (quoting respondent Morton Salt). Despite its formal availability, however, the *Morton Salt* discount, like the market share discounts at issue here, was practically inaccessible to a certain class of buyers whose customers' demands were not aligned with the discount scheme. *Id.* at 41. The Court held that the discount was functionally unavailable to these buyers. *Id.* at 42. The same result should have been reached

here, where petitioners' customers' demands, and not petitioners' own choices, bar petitioners from taking advantage of the offered discount schemes.

In addition to ignoring the import of *Morton Salt*, respondents also vainly attempt to justify the Sixth Circuit's dismissal of two apposite lower-court precedents construing the Robinson-Patman Act — *National Dairy Products Corp. v. FTC*, 395 F.2d 517 (7th Cir. 1968) and *Calumet Breweries, Inc. v. G. Heileman Brewing Co.*, 951 F. Supp. 749 (N.D. Ind. 1994). *See* RJR Br. 14-15; PM Br. 14. *National Dairy* held that a volume discount program was not functionally available to customers when those customers would have to join together into voluntary or cooperative programs to qualify for high-volume discounts. 395 F.2d at 523. Plainly, if purchasers cannot be required to act collectively to secure discounts, purchasers surely cannot be required to destroy their businesses to secure discounts. *See* Pet. 20. Similarly, *Calumet Breweries* rejected the argument that a discount was functionally available in part because to qualify for the discount the purchaser would have had to acquire more beer than it could sell before the beer went stale. 951 F. Supp. at 756. The defendant could not force the purchaser to make such an unreasonable business decision. *Id.* As these cases recognize, a choice to commit commercial suicide is not a choice at all. The Sixth Circuit barely paused over these precedents, instead distinguishing them because they involved volume-based discount schemes rather than market-share-based discount schemes — a fact that further undercuts respondents' contention that the Sixth Circuit understood that *Morton Salt*'s application to market-share-based discount programs. *See* Pet. App. 34a n.12.

Finally, contrary to PM's contentions, PM Br. 15, the Sixth Circuit's rulings do nothing to further the policies underlying the antitrust statutes. The Robinson-Patman Act

was designed to prevent buyers from securing price advantages merely due to their ability to purchase at high volumes. The Sixth Circuit has subverted this legislative goal by nullifying the functional availability test and thereby making it impossible for injured buyers to establish that discounts are commercially unattainable to them. These holdings not only encourage sellers to create illegitimate volume-based discount schemes, they also encourage sellers to disguise schemes for favoring large buyers as market-share-based discount schemes. The ultimate aim of the Act and of the antitrust laws more generally — to promote inter-brand competition — will be thwarted by the proliferation of such anticompetitive mechanisms.

III. The Sixth Circuit's Rulings Are Sufficiently Important to Warrant Review.

Respondents repeatedly claim that the opinions below are too "fact-bound," RJR Br. 6-7, or unimportant, PM Br. 14, to warrant review. At bottom, respondents' arguments boil down to a simple proposition: that this Court should close its eyes to the Sixth Circuit's error. This invitation to irresponsibility should be rejected. The Sixth Circuit has eviscerated a vital component of the federal antitrust regime. Its decisions certainly warrant this Court's review and reversal.

The Sixth Circuit's opinion has the potential to affect immediately the business dealings and bargaining conduct not just of petitioners but of every wholesaler in the country. On the Sixth Circuit's analysis, any ostensibly available discount program — even one impossible for a distributor to take advantage of, because it will go out of business if it does — will be deemed functionally available to all merchants. The upshot of these decisions is that sellers may now favor certain buyers by offering discounts that other buyers find impossible to achieve.

The potential economic impact of permitting such schemes cannot be overstated. Distributors like petitioners, primarily selling to convenience stores, have more than $85 billion in sales annually. *See* American Wholesale Marketers Association, http://www.awmanet.org/about.html. Focusing more broadly, there are at least 40,000 wholesale distribution companies in America. These corporations operate in over 80 different lines of business and sell everything from doorknobs to sporting goods. *See* National Association of Wholesalers-Distributors, http://www.naw.org. Their combined revenues run into hundreds of billions of dollars.

The Court should not lightly decide to ignore an erroneous statutory interpretation allowing manufacturers to discriminate in their pricing using market-share demands that are unattainable by many wholesalers. Such conduct threatens the efficiency and full-service nature of the wholesale distribution system while suppressing competition by raising the costs and blocking distribution of products from new entrants and low-cost manufacturers.

In the antitrust context, this Court frequently grants certiorari to resolve questions of clear importance, even in the absence of a split between the circuits. *See, e.g., Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565 (1982) (certiorari granted "[b]ecause the Court of Appeals' decision presents an important issue concerning the interpretation of the antitrust laws"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (certiorari granted because of the importance of the question to the antitrust and copyright laws); *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978) (certiorari granted because "[b]ecause of the importance of the issue for the agricultural community and for the administration of the antitrust laws"). Review is equally warranted here.

IV. PM's Defense of the Sixth Circuit's Sherman Act Ruling is Equally Unavailing.

Notwithstanding PM's arguments to the contrary, the Sixth Circuit's Sherman Act holding merits this Court's review.

First, petitioners demonstrated that PM has a dangerous probability of achieving monopoly power through its anticompetitive conduct. The simple fact is that PM controls over half of the nation's cigarette market. Pet. App. 72a-73a. PM contends that it has lowered prices in response to competition and that there are low barriers to entry in the cigarette business, but these assertions were belied by expert testimony demonstrating that PM only lowered its prices for certain favored buyers, raised its prices for disfavored buyers, and experienced no loss of customers from new entrants to the marketplace. Pet. 23-24. In addition, PM's market share increased from 2002 to 2005, despite the fact that it generally raised its prices during that period. Pet. 23. In the face of this evidence, the district court was wrong to grant summary judgment to PM on the issue of market power.

Second, as to anticompetitive conduct with specific intent to monopolize, the Sixth Circuit erred in its adoption of the district court's holding that petitioners' proof "establishes only harm to individual competitors, not harm to competition." Pet. App. 94a. The PM discount program caused distributors to drop rival products and increase purchases of PM brands in an attempt to drive their PM share of sales to the level necessary to attain the offered discounts. This alteration in distributors' sales mix caused PM's rivals to lose access to valuable markets and effectively curbed the ability of rival brands to grow their market shares. By the same token, the PM program harmed those distributors that could not make money while offering the sales mix that PM sought to incentivize. At both the manufacturing level and

the distribution level, PM's discount program harms competition.

The Court need not linger over PM's weak efforts to distinguish the cases that squarely conflict with the Sixth Circuit's holding on this issue. *See* PM Br. 21. While obviously those decisions "do not condemn PM USA's discount program," *id.*, they do squarely hold that dominant companies cannot abuse their position of power to drive competitors' products from retailers' shelves. *See* Pet. 26-27; *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 786 (6th Cir. 2002); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). The Sixth Circuit's evaluation of this issue is squarely in conflict with the holdings of its sister circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KYLE M. KEEGAN
CHRIS D. KIESEL
ROY, KIESEL, KEEGAN & DENICOLA
2355 DRUSILLA LANE
BATON ROUGE, LA 70809
(225) 927-9908

PAUL M. SMITH*
JENNER & BLOCK LLP
601 THIRTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 639-6000